SUPREME COURT, U.S.
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No. 04-901

IN THE
# Supreme Court of the United States

OREN BENTON,
*Petitioner*,
v.

CAMECO CORPORATION,
*Respondent*.

**On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit**

## BRIEF FOR RESPONDENT IN OPPOSITION

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March 7, 2005

## QUESTIONS PRESENTED

1. Whether the Tenth Circuit erred in following well-settled Supreme Court precedent requiring the weighing of all relevant factors in assessing the reasonableness of exercising personal jurisdiction, rather than elevating just one of those factors — the plaintiff's interest in pursuing suit in his home forum — to a "paramount" consideration.

2. Whether the Tenth Circuit's decision — that it would be unreasonable to exercise jurisdiction over a Canadian corporation that "barely" had minimum contacts with the forum state, where Canadian law governed the dispute and many of the witnesses resided in Canada — conflicts with the factually dissimilar decisions of other courts of appeals that the exercise of jurisdiction would be reasonable in those cases.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent Cameco Corporation states the following:

Cameco Corporation has no parent company, and no publicly held company owns 10% or more of its stock.

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## INTRODUCTION

Petitioner Oren Benton, a Colorado resident, sued respondent Cameco Corporation, a Canadian corporation, in federal court in Colorado, alleging breach of contract and related claims. The district court concluded that Cameco did not have minimum contacts with Colorado and dismissed for lack of personal jurisdiction, as well as for failure to state a claim. The Tenth Circuit affirmed, concluding that Colorado did not have personal jurisdiction over Cameco. Although it found that Benton "barely" had established that Cameco had minimum contacts with Colorado, it concluded that the overwhelming majority of the Supreme Court's factors for assessing the reasonableness of exercising jurisdiction led to the conclusion that "traditional notions of fair play and substantial justice" counseled against exercising jurisdiction.

The Tenth Circuit's conclusion was a fact-intensive one, based on the circumstances that Cameco is a Canadian corporation with "quite limited" contacts with Colorado, that Canadian law governs the dispute, and that many of the relevant witnesses reside in Canada. Although petitioner attempts to manufacture a conflict between the Tenth Circuit's judgment, and this Court's precedent and the decisions in other circuits, there is no conflict. Consistent with this Court's direction in such cases as *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), *Burger King Corp. v. Rudzewicz*, 471 U.S. 462 (1985), and *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286 (1980), the Tenth Circuit and other courts consider a number of factors in weighing the overall reasonableness of exercising jurisdiction over a foreign defendant with minimum contacts to the forum state. Petitioner simply complains about the manner in which well-settled precedent and doctrine were applied to the facts in this case.

## STATEMENT

### A. Factual Background

Benton is a Colorado resident who as of 1994 had been in the business of brokering and trading uranium for a number of years. *See* Pet. App. 2.

Cameco is a Canadian company with its principal offices in Saskatchewan, Canada. *See id.* Cameco has no offices in Colorado, has no bank accounts in Colorado, has no office or property in Colorado, is not licensed to do business in Colorado, has no employees in Colorado, does not advertise or solicit business in Colorado, and does not pay taxes in Colorado. *See id.* at 9, 14.

In November 1994, Benton in Colorado and Cameco in Canada signed a "Memorandum of Understanding" ("MOU") that the district court would later describe as an unenforceable "agreement to agree." *Id.* at 40. The MOU described two possible transactions between Benton and Cameco. Under the first, Cameco would provide Benton's affiliates with uranium sufficient to fulfill Benton's purported sales commitments to 18 different utility companies around the world, none of which was in Colorado. The second potential transaction discussed in the MOU described a possible joint venture pursuant to which the parties could conduct future uranium trading activities. *See id.* at 2-3.

The MOU expressly conditioned these two potential transactions on the fulfillment of numerous conditions precedent, including the approval of Cameco's board of directors. *See id.* at 3, 40-41.

Cameco sent two employees to Colorado to begin the due diligence review referenced in the first condition precedent. *See id.* at 11. That review disclosed numerous issues of concern for Cameco. (Benton's complaint admits that he was already in severe financial distress.) Barely a month after executing the MOU, in December 1994, Cameco's board of directors met and declined to approve the potential transactions described in the MOU. *See id.* at 3. Benton's complaint specifically conceded that at least this one condition — approval by Cameco's board of directors — was not fulfilled. *See id.* at 41-42.[1]

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[1] The district court recognized that, although the lack of board approval was the only condition that Benton *conceded* was not satisfied, in truth

Benton filed his complaint against Cameco six years later, on November 28, 2000. Colorado's three-year statute of limitations would already have expired on his claims. *See id.* at 42. Petitioner alleged in his complaint, however, that Canadian law, including its six-year statute of limitations, applied to his claims. As the district court noted, "it is only application of the Canadian statute of limitations that would allow Plaintiff's claims to proceed." *Id.* at 38.

**B. The Decisions Below**

Upon motion by Cameco, the district court dismissed Benton's complaint on two grounds. First, the district court held that Cameco was not subject to personal jurisdiction in Colorado. *Id.* at 39. Second, the court ruled that Benton's complaint would be dismissed under Federal Rule of Civil Procedure 12(b)(6) because Benton's claims were "without merit on their face." *Id.* at 43.

Specifically, the district court held that jurisdiction over Cameco was lacking because Cameco did not have "minimum contacts" with Colorado and that it would not comport with due process to exercise jurisdiction over Cameco, whose contacts with Colorado were "tangential at best." *Id.* at 39. The court based its holding on jurisdictional facts that were largely undisputed. *Id.* at 36. Among other facts, the court noted that none of the utilities that were the subject of the MOU is in Colorado and none of the uranium that would have been supplied to those utilities would ever have been in Colorado. *Id.* at 36-37.

In addition, the district court found that Benton's substantive claims were "without merit on their face," in part because the MOU was an unenforceable "agreement to agree."

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the proposed transactions in the MOU never even came close to fruition: "It appears unrefuted that *none* of these [other] conditions were satisfied." Pet. App. 41 (emphasis added). At the motion to dismiss stage, however, the court accepted Benton's allegation that these other conditions were satisfied even though "it appears obvious that this allegation will be totally without support." *Id.*

*Id.* at 40-41, 43. The court concluded there was "no contract to breach" under Canadian law because the undisputed failure of at least one condition precedent listed in the MOU — that of board approval — "clearly precludes the formation of a contract." *Id.* at 42. The court further found that Benton's claim for tortious interference was only a "repackaged attempt" to circumvent the undisputed failure of a condition precedent, which did not state a cognizable tort claim. *Id.* at 43.

The Tenth Circuit's *de novo* review applied the two-part jurisdictional analysis of *Asahi*, 480 U.S. at 112-14, and its predecessors, including *Burger King* and *World-Wide Volkswagen*. The Tenth Circuit disagreed with the district court's conclusion that Cameco lacked minimum contacts with Colorado. Even so, however, the Tenth Circuit considered the question of minimum contacts to be "very close" and in "the grey area," and found that Cameco's contacts with Colorado "were quite limited, barely satisfying the minimum contacts standard." Pet. App. 9, 17.

The Tenth Circuit then considered whether the exercise of personal jurisdiction over Cameco would be reasonable, and it expressly analyzed the five reasonableness factors identified in *World-Wide Volkswagen*, *Burger King*, and *Asahi*. The Tenth Circuit observed, *inter alia*, that Cameco is a Canadian corporation, that Canadian law governed the case, and that many witnesses reside in Canada. (The alleged injury was inflicted in Canada by Cameco's board of directors, when they did not approve the MOU, and virtually all members of that board reside in Canada.) The Tenth Circuit then concluded that four of the five reasonableness factors showed that the exercise of jurisdiction would not comport with due process, and the fifth was neutral. Given this strong showing, the Tenth Circuit agreed that the exercise of jurisdiction would not be fair and reasonable, particularly in light of

petitioner's "quite limited" showing of minimum contacts. Pet. App. 14-17.[2]

The dissenting opinion applied exactly the same legal analysis as the panel majority. The dissenting opinion, however, interpreted the facts differently than did the majority. Thus, the dissent believed, contrary to the panel, that Cameco's contacts with Colorado were substantial. The dissent also disagreed with the panel majority in its assessment of the weight of the reasonableness factors. The dissent took the position that it would not be unreasonable to assert jurisdiction in this case — notwithstanding that the case involved a foreign defendant being sued under foreign substantive law and a foreign statute of limitations in a case involving foreign witnesses.

Because it affirmed the dismissal for lack of personal jurisdiction, the Tenth Circuit did not consider the district court's alternative basis for dismissing the complaint, *i.e.*, petitioner's failure to state a claim upon which relief could be granted. *Id.* at 5 n.1, 19. Likewise, the dissenting opinion did not address petitioner's failure to state a claim.

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[2] Though ignored in his legal argument, petitioner implies that Cameco should have been deemed subject to jurisdiction in Colorado because it has a subsidiary in Colorado. *See* Pet. 2 n.1. Both the district court and the court of appeals considered and rejected petitioner's argument on the well-settled ground that a parent company has a separate corporate existence than its subsidiary. *See* Pet. App. 18-19, 38. This Court recently denied a petition for a writ of certiorari addressing whether a subsidiary corporation's contacts with a forum "may be used to find *in personam* jurisdiction over its parent company even though there is no basis for piercing the corporate veil." Pet. at i, *Dassault Aviation v. Anderson*, No. 04-222, *cert. denied*, 125 S. Ct. 606 (Nov. 29, 2004).

## REASONS FOR DENYING THE PETITION

The decision below applied settled jurisdictional law to the particular set of facts present here and reasonably and properly concluded that exercising personal jurisdiction over respondent was improper. Petitioner's effort to construe the Tenth Circuit's unremarkable resolution of this personal jurisdiction case as reflecting a circuit split is unavailing — the courts of appeals themselves perceive no conflict, the test they apply is faithful to this Court's precedent, and, unsurprisingly, the different results they have reached flow from the different facts presented case-by-case. Further review therefore is unwarranted.

### I. THE TENTH CIRCUIT PROPERLY APPLIED THIS COURT'S PRECEDENT, WHICH PROVIDES NO SUPPORT FOR PETITIONER'S PROPOSED BRIGHT-LINE TEST FOR DETERMINING THE REASONABLENESS OF EXERCISING PERSONAL JURISDICTION

Petitioner first contends that certiorari should be granted because the Court should announce a new bright-line rule for personal jurisdiction. Specifically, petitioner argues that, where the "minimum contacts" analysis is satisfied, the reasonableness analysis should turn primarily on whether the plaintiff is a resident of the state in which the case is brought. *See, e.g.*, Pet. 6 ("[A] United States citizen must have a right to access his home state's courts to sue a non-resident alien who purposely establishes minimum contacts with the forum."); Pet. 12 ("The interest of a forum resident should be paramount when a court determines whether a defendant has presented a compelling case to defeat otherwise constitutional jurisdiction.").

Petitioner's proposed bright-line test not only finds no support from this Court's prior decisions, but also conflicts with them. Under this Court's precedent, the inquiry into the reasonableness of exercising personal jurisdiction is fact-intensive and requires consideration of *all* factors affecting "traditional notions of fair play and substantial justice." Peti-

tioner's proposal also ignores this Court's *Asahi* decision, which explains that, where a foreign defendant is sued in a United States court, the court should conduct "a careful inquiry into the reasonableness of the assertion of jurisdiction," because "[g]reat care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." 480 U.S. at 115 (internal quotation marks omitted). The Tenth Circuit faithfully applied these principles and Supreme Court precedent.

### A. The Tenth Circuit Properly Applied This Court's Precedent

The determination of whether a foreign defendant can be subject to personal jurisdiction in a forum state requires a two-part inquiry. First, a court must determine "whether the defendant purposefully established 'minimum contacts' in the forum State." *Burger King*, 471 U.S. at 474 (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). This inquiry requires an analysis of whether the defendant "purposefully directed" his activities at residents of the forum and whether the litigation arises out of those purposeful activities. *Id.* at 472. Thus, "minimum contacts must have a basis in 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.'" *Asahi*, 480 U.S. at 109 (quoting *Burger King*, 471 U.S. at 475).

Second, even if such minimum contacts are established, a court must consider whether the exercise of personal jurisdiction "would offend traditional notions of fair play and substantial justice." *Asahi*, 480 U.S. at 113 (internal quotation marks omitted); *Burger King*, 471 U.S. at 477-78 ("Nevertheless, minimum requirements inherent in the concept of 'fair play and substantial justice' may defeat the reasonableness of

jurisdiction even if the defendant has purposefully engaged in forum activities."). This

> determination of the reasonableness of the exercise of jurisdiction *in each case* will depend on an evaluation of several factors. A court *must consider* the burden on the defendant, the interests of the forum State, and the plaintiff's interest in obtaining relief. It *must also weigh* in its determination "the interstate judicial system's interest in obtaining the most efficient resolution of controversies; and the shared interest of the several States in furthering fundamental substantive social policies."

*Asahi*, 480 U.S. at 113 (quoting *World-Wide Volkswagen*, 444 U.S. at 292) (emphases added).[3]

The large majority of personal jurisdiction cases involve disputes between citizens of different *states*. Where the defendant is from a foreign country, however, the international context of a dispute must also be considered in the reasonableness analysis. "Great care and reserve should be exercised when extending our notions of personal jurisdiction into the international field." *Asahi*, 480 U.S. at 115 (internal quotation marks omitted).[4]

The Tenth Circuit properly applied these precepts in this case. The Tenth Circuit first considered whether Cameco had minimum contacts with Colorado and determined that minimum contacts had "barely" been shown. *See* Pet. App. 6-13.[5] The Tenth Circuit then considered each of the reason-

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[3] The two-part inquiry may be applied in reverse order such that jurisdiction is denied based solely on the multi-faceted reasonableness test without even examining minimum contacts. *See Asahi*, 480 U.S. at 121 (Stevens, J., concurring).

[4] Neither of the other recent decisions by this Court regarding personal jurisdiction (*Burger King* and *World-Wide Volkswagen*) involved a foreign defendant and thus neither had occasion to incorporate the effects of that circumstance in its discussion.

[5] In the circumstances of this case, the Tenth Circuit's conclusion that Benton had shown "minimum contacts" with Colorado was generous to Benton. Indeed, it was merely "fortuitous" that Cameco's relatively

ableness factors — factors that "must [always] be weighed," *Burger King*, 471 U.S. at 486 — including the international context of the dispute and the burden on the foreign defendant, and it found that those considerations weighed heavily against the exercise of personal jurisdiction. *See* Pet. App. 14-17. The legal standard and analysis applied by the Tenth Circuit were entirely proper and consistent with this Court's precedent.

### B. Petitioner's Bright-Line Test Has Not Been And Should Not Be Adopted By This Court

Petitioner suggests that a case involving "a forum resident plaintiff" is not an "appropriate case[]" for consideration of the reasonableness factors. Pet. 15. Petitioner also asserts that, if a plaintiff is a resident of the forum state, the court should eschew any "sliding scale" test and not consider the relative weakness of a defendant's minimum contacts. That assertion, however, conflicts with the established approach in all circuits.

There is no support in this Court's precedent for petitioner's novel positions. This Court consistently has rejected convenient formulas for analyzing personal jurisdiction. *See Burger King*, 471 U.S. at 485 ("We . . . reject any talismanic jurisdictional formulas"); *World-Wide Volkswagen*, 444 U.S. at 294 ("the requirements for personal jurisdiction over nonresidents have evolved . . . to the flexible standard of *International Shoe*"). Indeed, "the facts of each case must [*always*] be weighed in determining whether personal jurisdiction would comport with fair play and substantial justice." *Burger King*, 471 U.S. at 485-86 (internal quotation marks omitted; emphasis added; alteration in original). To elevate

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sparse contacts included conversations in, and a short trip to, Colorado. And even these minor contacts quickly resulted in an aborted transaction. *See, e.g., Soma Medical Int'l v. Standard Chartered Bank*, 196 F.3d 1292, 1299 (10th Cir. 1999) (concluding that there were not sufficient minimum contacts with the forum state, Utah, where there was "no indication that Utah had anything but a fortuitous role in the parties' past dealing or would have any role in their continuing relationship").

the factor of a plaintiff's residence in the forum state above all other factors would be to adopt just such a "talismanic formula" this Court rejects.

This Court, likewise, has demonstrated that the relative strengths and weaknesses of the plaintiff's showing of minimum contacts may be considered together with the "reasonableness factors" for determining the reasonableness of exercising jurisdiction. *See Asahi*, 480 U.S. at 113 (evaluating reasonableness factors even after determining that minimum contacts had not been established); *Burger King*, 471 U.S. at 477-78 (considering reasonableness factors even after concluding that defendant purposefully availed himself of resident plaintiff's forum state). The Tenth Circuit's analysis is consistent with this Court's approach and reflects the fact that, in a case where minimum contacts are particularly weak, the reasonableness factors relied upon by the defendant may establish the heavy burden and impropriety of the defendant's being required to litigate in a foreign forum.[6]

Petitioner also suggests that the Tenth Circuit improperly dispensed with the requirement, set forth in *Burger King*, that Cameco make a "compelling" showing that exercising jurisdiction would be unreasonable if minimum contacts are shown. Pet. 9. Petitioner's argument elevates form over substance. The Tenth Circuit did not expressly state that Cameco's showing was "compelling." But it implicitly so found by ruling that four of the five reasonableness factors weighed against exercising jurisdiction, and by ruling that none of the factors weighed in favor of jurisdiction. Moreover, unlike *Burger King*, this case involves a foreign defendant, the application of foreign law and foreign statute of limitations, and the involvement of a number of foreign witnesses, including nearly all of Cameco's witnesses. Indeed, this Court has noted that "significant weight" should be given

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[6] Indeed, the dissenting opinion in this case also applied the same analysis; it simply saw the facts differently, deeming the minimum contacts to be stronger and the burdens weaker than the majority's balancing of those factors. *See* Pet. App. 20-25.

to the burdens placed upon a foreign defendant "in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders." *Asahi*, 480 U.S. at 114. *See also Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984) (declining to find proper exercise of personal jurisdiction over foreign corporation on basis of minimum contacts).[7] Cameco's showing of unreasonableness was compelling.

In sum, petitioner simply disagrees with the manner in which the Tenth Circuit applied this Court's "well-established constitutional analysis for personal jurisdiction," Pet. App. 6, to the particular facts of this case. But the court's application was proper in light of respondent's attenuated minimum contacts to the forum and the other factors weighing heavily against the exercise of jurisdiction over respondent as a foreign defendant. Even if one might weigh the factors differently, however — as the dissent did — petitioner has presented no legal issue warranting this Court's review.

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[7] The courts of appeals — including circuits relied upon by petitioner as adopting the so-called "Federal Circuit test," *see infra* pp. 19-22 — likewise give strong consideration to such comity and burden concerns. *See, e.g., Base Metal Trading, Ltd. v. OJSC "Novokuznetsky Aluminum Factory,"* 283 F.3d 208 (4th Cir. 2002) (finding a foreign manufacturer lacked sufficient contacts with Maryland to allow exercise of personal jurisdiction consistent with Due Process Clause, even though shipment of aluminum from manufacturer had been seized in Maryland); *Foster v. Arletty 3 SARL*, 278 F.3d 409 (4th Cir. 2002) (finding that attenuated contacts between French corporation and plaintiff were insufficient, standing alone, to warrant personal jurisdiction); *Consolidated Dev. Corp. v. Sherritt, Inc.*, 216 F.3d 1286 (11th Cir. 2000) (finding district court lacked personal jurisdiction over Canadian corporations and their affiliates given limited nature of minimum contacts). None of these courts has articulated, let alone applied, anything similar to petitioner's proposed new test. A bright-line rule that ignores, or even minimizes, the international aspects of cases involving foreign defendants is unprecedented and inconsistent with *Asahi*.

## II. COURTS OF APPEALS ARE NOT IN CONFLICT IN EVALUATING THE REASONABLENESS OF ASSERTING PERSONAL JURISDICTION OVER FOREIGN DEFENDANTS

In an obvious attempt to manufacture a "circuit split" beckoning this Court's attention, petitioner alleges that there is a "stark" contrast between what it terms a "'Federal Circuit' approach" and the "'Tenth Circuit' approach" to determinations of personal jurisdiction. Pet. 16. The conflict petitioner seeks to identify is illusory. Any differences in the outcomes are explained simply by the fact-specific nature of these courts' personal jurisdiction inquiries. Indeed, it is highly doubtful that the outcome of this case would have been any different if litigated in any other circuit. Where facts in other cases were similar to those here — even in circuits allegedly in conflict with the Tenth Circuit — courts have reached similar results.

Notably, petitioner has cited no court of appeals or other decisions rejecting an analysis that considers the relative weakness of a defendant's minimum contacts in applying the reasonableness factors. Likewise, to respondent's knowledge, no court of appeals has endorsed petitioner's theory that consideration of the reasonableness factors is appropriate *unless* the plaintiff is a forum resident, nor has any held that the plaintiff's status as a forum resident is the "paramount" factor under the various reasonableness factors. Contrary to petitioner's assertion that there is "a surprising state of disunity" in the courts of appeals following *Burger King*, Pet. 13, there is no indication in the petition or any of the cases cited therein that the courts of appeals themselves perceive any conflicts in their approaches to personal jurisdiction analysis. To the contrary, all of these courts approach these fact-specific inquiries in a similar manner — first addressing the existence of minimum contacts, then weighing all of the various factors set out in *World-Wide Volkswagen*, *Burger King*, and *Asahi*, to determine if the exercise of jurisdiction would otherwise be unreasonable.

### A. There Is No Distinct "Federal Circuit Test" That Conflicts With The Tenth Circuit's Analysis

Petitioner argues that there is a circuit conflict as to how courts assess the reasonableness of exercising personal jurisdiction in cases involving a forum plaintiff. *See* Pet. 13. Petitioner relies primarily on the Federal Circuit opinion in *Inamed Corp. v. Kuzmak*, 249 F.3d 1356 (Fed. Cir. 2001), to argue that the Federal Circuit — followed by the Fourth, Seventh, and Eleventh Circuits — adheres more correctly than the Tenth Circuit (and other circuits) to the personal jurisdiction tests set forth in *Burger King* and *World-Wide Volkswagen*. *See* Pet. 13-14. But there is no conflict in the methodologies employed by these various courts. Rather, all of these cases apply Supreme Court precedent similarly. Although the courts reached different results in those cases, the facts of *Inamed* and petitioner's other cases are easily distinguished.

In *Inamed*, the Federal Circuit overturned a finding of a California federal district court that it had no jurisdiction over a New Jersey defendant being sued by California corporations for a declaratory judgment that his patents were invalid. The Federal Circuit relied on earlier precedent to engage in a three-part inquiry, asking: first, whether the defendant "'purposefully directed'" its activities at residents of the forum; next, whether the claim arose out of or related to the defendant's activities within the forum; and, finally, whether exercising personal jurisdiction was "'reasonable and fair.'" *Inamed*, 249 F.3d at 1360 (quoting *Akro Corp. v. Luker*, 45 F.3d 1541, 1545 (Fed. Cir. 1995)). Under the first two parts of the inquiry, the *Inamed* court found that, because the defendant had entered into four patent licensing agreements in the forum state and sent a letter alleging patent infringement to the plaintiffs in the forum state, there were sufficient contacts to exercise jurisdiction over the defendant. *See id.* at 1361-62. Unlike the Tenth Circuit here, the Federal Circuit did *not* conclude that the plaintiffs "barely" had showed

minimum contacts by the defendant, nor did it opine that such contacts were "quite limited."

The *Inamed* court then turned to the third part of the *Akro* inquiry — *i.e.*, whether the exercise of jurisdiction would be "reasonable and fair." The court first set forth the same five factors from *Asahi* that the Tenth Circuit enumerated here. *Id.* at 1363. The court then concluded that the defendant had not met his burden to show that exercising jurisdiction would be unreasonable. The court rejected the defendant's only argument — that he "ha[d] been quite ill for some time with back injuries," which he claimed prevented him from traveling to California. *Id.* The court opined that "[a]lternative means" were available to remedy the defendant's sole concern, including a motion of *forum non conveniens* or for change of venue. *Id.* The defendant apparently did not argue that any of the other *Asahi* reasonableness factors counseled against the exercise of personal jurisdiction, and the court analyzed none of them. The case also did not involve a foreign defendant. Consequently, *Asahi*'s instruction — that "significant weight" should be given to the burdens placed upon a foreign defendant "in assessing the reasonableness of stretching the long arm of personal jurisdiction over national borders," 480 U.S. at 114 — simply did not apply in *Inamed*.

The facts of *Inamed* are plainly quite different from the instant case, where the factors counseling against the exercise of jurisdiction are much more substantial and numerous than the New Jersey defendant's aversion to interstate travel. Indeed, the Tenth Circuit here was presented with and analyzed *all* of the *Asahi* reasonableness factors, and it concluded that four of the five weighed heavily against exercising jurisdiction, whereas the fifth was neutral. *See* Pet. App. 14-17. As the Tenth Circuit noted, Cameco is not simply an individual out-of-state defendant, but a Canadian corporation, governed by a different legal system, where its "officers and employees will not only have to travel outside their home country, they will also be forced to litigate the dispute in a foreign forum unfamiliar with the Canadian law governing the dispute." *Id.*

at 15 (internal quotation marks omitted). By contrast, the court in *Inamed* faced no international law or comity issues.

Moreover, as the Tenth Circuit stated below, many witnesses in this case reside in Canada, and Cameco's alleged breach occurred in Canada, meaning that "litigating the dispute in Colorado would not be more efficient than in Canada." *Id.* at 16. Again, there is no suggestion in *Inamed* that litigating in California would have inconvenienced non-party witnesses, let alone witnesses from another country, or that it would have been more convenient elsewhere.

It therefore is reasonable to conclude that, like the Tenth Circuit, the Federal Circuit would on similar facts hold that a foreign defendant such as Cameco had met its burden to show the unreasonableness of exercising jurisdiction. In any event, there is nothing in *Inamed* that suggests a conflict in these courts' approach to the jurisdictional question, let alone a bright-line rule where the case involves a plaintiff who is a forum resident. Indeed, the court never even concluded that the plaintiffs' showing of minimum contacts was weak; as a result, the court had no occasion to consider whether, as here, the reasonableness factors should be evaluated in light of the defendant's attenuated minimum contacts. Simply put, *Inamed* is wholly inapposite to the questions petitioner presented.[8]

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[8] Other decisions in the Federal Circuit make clear that the "conflict" that petitioner seeks to manufacture is illusory. Indeed, the Federal Circuit has held that — even where the suit was initiated by a plaintiff who was a resident of the forum, and even where the plaintiff established that the defendant had constitutionally sufficient minimum contacts with the forum — notions of "fair play and substantial justice" can defeat the reasonableness of exercising jurisdiction. *See Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355 (Fed. Cir. 1998). In that case, the Federal Circuit set forth the constitutional test for personal jurisdiction (because Minnesota's long-arm statute extended to the limits of due process), including the *World-Wide Volkswagen* test for minimum contacts and the *Burger King* articulation of the "factors to determine whether the assertion of personal jurisdiction would comport with fair play and substantial justice." *Id.* at 1358-59 (internal quotation marks

### B. Other Circuits Do Not Conflict With The Tenth Circuit's Analysis

Petitioner asserts in passing that other circuits line up with the Federal Circuit in *Inamed* and therefore conflict with the Tenth Circuit below. *See* Pet. 13. But those cases have little relevance to (and present no conflict with) the decision below. Like *Inamed*, none of those cases involved a foreign defendant, none concluded that the defendant's contacts were minimal or "limited," and none articulated a bright-line rule for cases involving a plaintiff who was a forum resident. Rather, each of those courts, like the Tenth Circuit here, examined the same reasonableness factors to determine if the exercise of jurisdiction would comport with notions of fair play and substantial justice. They simply reached different results on considerably different facts.

In *Pittsburgh Terminal Corp. v. Mid Allegheny Corp.*, 831 F.2d 522 (4th Cir. 1987), the court considered the constitutionality of the application of West Virginia's long-arm statute to non-resident defendants who were directors on the board of a West Virginia corporation. The two directors resided in Virginia. The court concluded that these defendants had minimum contacts in West Virginia, and that "[e]xcellent reasons exist for allowing a State to assert jurisdiction over

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omitted). Next, it reviewed defendant HHI's contacts with Minnesota and assumed that there were sufficient minimum contacts to exercise jurisdiction, including HHI's "cease and desist" letters threatening Red Wing with a patent infringement suit. Notwithstanding these minimum contacts, however, the Federal Circuit concluded that the exercise of personal jurisdiction would be improper. It stated: "[E]ven though cease-and-desist letters alone are often substantially related to the cause of action (thus providing minimum contacts), the minimum requirements inherent in the concept of fair play and substantial justice defeat the reasonableness of jurisdiction." *Id.* at 1360 (internal quotation marks and ellipsis omitted). Notably, the Federal Circuit placed no emphasis on the fact that the plaintiff was a forum resident, let alone elevating this to a "paramount" concern. Indeed, the court concluded that there was no personal jurisdiction over HHI, a domestic corporation without the international burdens and issues present in this case.

non-resident directors of domestic corporations." *Id.* at 528. Next, the court enumerated the reasonableness factors articulated in *Burger King*, and then concluded that, not only do the reasonableness factors not "make the assertion of jurisdiction unreasonable in this case," but, "[t]o the contrary, we feel that, if anything, these factors make the assertion of jurisdiction more reasonable." *Id.* at 529. Specifically, the court noted that "the burden on the defendants of litigating in West Virginia is *de minimis* [in light of the fact that they] reside in the bordering Commonwealth of Virginia." *Id.* Also, the court emphasized West Virginia's "strong interest" in permitting a forum for suits alleging wrongdoing by the directors of a West Virginia corporation. *Id.* at 530. None of this, or anything else in the Fourth Circuit's opinion, has any reasonable application to the facts of this case.

Similarly, in *Heritage House Restaurants, Inc. v. Continental Funding Group, Inc.*, 906 F.2d 276 (7th Cir. 1990), the Seventh Circuit found that Illinois had personal jurisdiction over an out-of-state company that had solicited and transacted business with an Illinois corporation. After completing an analysis under Illinois's long-arm jurisdiction statute, the court considered the due process implications of finding personal jurisdiction over a non-resident (U.S.) corporation, stating that such an analysis involves a determination as to whether a defendant could "reasonably anticipate being haled into court" in the forum state. *Id.* at 283 (quoting *World-Wide Volkswagen*, 444 U.S. at 287). There was no discussion of *Asahi* or consideration of the foreign aspects of exercising jurisdiction, because *Heritage House* involved only United States corporations. There was no finding that contacts by the out-of-state corporation were only minimal, nor that a sliding scale should (or should not be) applied. Again, the case is simply inapposite.[9]

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[9] Other Seventh Circuit cases confirm that its test for personal jurisdiction is substantively similar to the test employed by the Tenth Circuit and other circuits. The Seventh Circuit has explained that, even "[o]nce minimum contacts have been shown to exist, a court must examine other fac-

Finally, in *Republic of Panama v. BCCI Holdings (Luxembourg) S.A.*, 119 F.3d 935, 945 (11th Cir. 1997), a Panamanian corporation brought suit against an American corporation (First American) under the RICO statute, on the grounds that First American had diverted government funds for the personal use of a military officer. The RICO statute contains a nationwide service-of-process provision, but the defendant argued that being haled into court in Florida violated the Due Process Clause of the Fifth Amendment. The court of appeals acknowledged that there was confusion on the issue of how the Fifth Amendment's Due Process Clause applies to cases involving a nationwide service-of-process provision. *Id.* at 942. It concluded, however, that it could borrow principles from the personal jurisdiction analysis under the Fourteenth Amendment, and it then engaged in a balancing test, relying on *Asahi*, which allowed it to "determine if the infringement on individual liberty has been justified sufficiently by reference to important government interests." *Id.* at 946. But because this case involved a federal statute, the court concluded that it could not "apply these [*Asahi*] factors mechanically." *Id.* In particular, the court noted that "a defendant's contacts with the forum state play no magical role in the Fifth Amendment analysis." *Id.* Whatever the accuracy of that analysis under a federal statute allowing for nationwide service of process, it is of no relevance to this case.

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tors, such as the forum's interest in adjudicating the dispute and the burden on the defendant, to determine whether the exercise of personal jurisdiction satisfies traditional notions of fair play and substantial justice." *Central States, Southeast & Southwest Areas Pension Fund v. Reimer Express World Corp.*, 230 F.3d 934, 943 (7th Cir. 2000) (citing *Burger King*). In *Central States*, the court concluded that the defendant Canadian corporations had insufficient contacts with the forum to establish personal jurisdiction and that the reasonableness factors did not otherwise confer jurisdiction. *Id.* at 945-46. *See also International Medical Group, Inc. v. American Arbitration Ass'n, Inc.*, 312 F.3d 833, 846 (7th Cir. 2002) (articulating same reasonableness test for jurisdiction "[o]nce minimum contacts have been shown," and dismissing for lack of jurisdiction because of insufficient contacts), *cert. denied*, 540 U.S. 822 (2003).

The court also noted that both parties were multinational corporations, and that discovery would be engaged in throughout the world, such that the defendant had not demonstrated sufficient inconvenience of litigating in Florida. *Id.* at 948. Again, the facts of this unusual case are distinguishable from the case at hand, where the Tenth Circuit concluded that much of the discovery would occur in respondent's home forum in Canada, pursuant to Canadian law, and where it concluded that a Colorado forum was no more convenient or efficient.[10]

In short, the outcomes of these cases were different than the outcome below because this case presented a far stronger case against exercising jurisdiction. Needless to say, the same legal test will yield different outcomes depending on the specific facts of different cases. There is no reason to believe that this case — which "barely" reflected constitutional minimum contacts and included a strong showing against the exercise of personal jurisdiction — would have reached a different conclusion in any other circuit.

### C. Circuits Addressing Similar Facts Have Reached Judgments In Agreement With The Tenth Circuit

The complete absence of any conflict among the circuits is further demonstrated by the fact that other circuits — including circuits cited by petitioner as following the alleged "Fed-

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[10] The Eleventh Circuit's jurisprudence clearly is not in conflict with the Tenth Circuit or other circuits in analyzing the personal jurisdiction issues. Like those courts, the Eleventh Circuit (1) analyzes both constitutional requirements of "minimum contacts" and "notions of fair play and substantial justice"; (2) considers these issues in conjunction with one another, because a strong showing on one might compensate for a weak showing on another; and (3) places no "paramount" or primary emphasis on the plaintiff's status as forum resident. *See, e.g., Sun Bank, N.A. v. E.F. Hutton & Co.*, 926 F.2d 1030, 1034-35 (11th Cir. 1991) (concluding that the individual defendant's contacts were insufficient, but noting that it must "consider whether considerations of fair play and substantial justice" justify exercising jurisdiction — including convenience to the litigants; and nevertheless reversing the district court's exercise of personal jurisdiction).

eral Circuit test" — have reached the same conclusion as the Tenth Circuit did below when presented with similar facts. In *Ellicott Machine Corp. v. John Holland Party Ltd.*, 995 F.2d 474 (4th Cir. 1993), the plaintiff was a corporation in the state in which it brought suit (Maryland). The plaintiff sought jurisdiction over an Australian corporation (Holland), which had minimal contacts with the forum state, and it sought a declaratory judgment that it should not have to pay Holland for claimed cost overruns on a transaction between the parties. In analyzing personal jurisdiction issues, the Fourth Circuit concluded that Holland had purposefully availed itself of the Maryland forum, but it nevertheless emphasized the fact that Holland was a foreign corporation whose contacts with Maryland "resulted from a single, short-term contract." *Id.* at 478-79. This fact, coupled with the connection between this venture and Australia, meant that the court would have to focus more on the question of "traditional notions of fair play and substantial justice" involved in determining whether to exercise personal jurisdiction. *Id.* at 479 (internal quotation marks omitted).

Reciting the five reasonableness factors from *World-Wide Volkswagen*, the *Ellicott* court noted that these factors applied "with particular force . . . against foreign national defendants." *Id.* Like the Tenth Circuit, the Fourth Circuit concluded that Maryland had no personal jurisdiction over the Australian defendant corporation, adding that the issues implicated in the suit involved "substantive social policies affecting international trade, business, and sovereignty concerns," all of which mitigated against litigation in Maryland. *Id.*[11] *See also Nationwide Mut. Ins. Co. v. Tryg Int'l Ins. Co.*, 91 F.3d 790, 797 (6th Cir. 1996) ("it would be unreasonable to exercise jurisdiction over [the Danish defendant] in this

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[11] Although petitioner's "Federal Circuit test" is without substance in any event, it is particularly misleading for petitioner to label the Fourth Circuit as following that "test." The *Ellicott* decision is more recent than the older *Pittsburgh Terminal* decision, and it follows the Tenth Circuit's approach and obviously is much more similar to the facts presented here.

case, given the very minimal connections between the defendant and the State of Ohio"); *Core-Vent Corp. v. Nobel Indus. AB*, 11 F.3d 1482 (9th Cir. 1993) (analysis of reasonableness factors showed that exercise of jurisdiction over Swedish defendant would be unreasonable, whether or not minimum contacts were established). Like all of these cases, the instant case was decided entirely on the basis of its unique set of facts, consistent with the analyses these other courts apply in similar circumstances.[12]

Petitioner also seems to suggest that there should be a different test for Canadian defendants, ostensibly because "'the judicial systems of Canada and the United States are rooted in the same common law traditions.'" Pet. 10 (quoting *Theunissen v. Matthews*, 935 F.2d 1454, 1462 (6th Cir. 1991)). Petitioner cites a few court of appeals decisions in which personal jurisdiction was exercised over a Canadian defendant. Yet in each case the court of appeals, like the Tenth Circuit here, simply applied the reasonableness test and reasonableness factors presented in *Asahi* to the unique facts of those cases. *See Aristech Chem. Int'l, Ltd. v. Acrylic Fabricators Ltd.*, 138 F.3d 624, 628 (6th Cir. 1998) (applying

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[12] The same can be said of other circuits. Petitioner does not quarrel with the reasonableness test as applied by the Second, Third, Fifth, and Sixth Circuits (except to the extent they do not give "primacy" to the plaintiff's residence — as no case ever has). *See* Pet. 14-15. Petitioner's characterization of supposedly different standards applied in the few remaining circuits, however, is illusory. *See Ticketmaster-New York, Inc. v. Alioto*, 26 F.3d 201, 209-12 (1st Cir. 1994) (refusing to exercise jurisdiction in Massachusetts over California resident after extensive consideration of reasonableness factors); *Core-Vent*, 11 F.3d at 1487-88 (recognizing that a defendant who has purposefully directed his activities must make a compelling case, through balancing the reasonableness factors, that exercising jurisdiction would be unreasonable); *Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 374 (8th Cir. 1990) (correctly explaining that, "in addition to determining whether a defendant has purposefully established minimum contacts with the forum state, courts must also examine" the *Asahi* reasonableness factors, because, in "certain unusual cases," personal jurisdiction will not be exercised even if minimum contacts are proved).

*Asahi* analysis to Kentucky case involving goods manufactured in Kentucky under contract that was expressly governed by Kentucky law); *Schulptchair, Inc. v. Century Arts, Ltd.*, 94 F.3d 623, 631-32 (11th Cir. 1996) (applying *Asahi* analysis to Canadian defendant that breached "a carefully structured long-term agreement" envisioning wide-reaching contacts with Florida in which it was expressly provided that disputes would be governed by Florida law in a Florida court); *Theunissen*, 935 F.2d at 1461-62 (applying analysis to a simple personal injury case in which defendant's residence of Windsor, Ontario, was only 10 miles from plaintiff's residence of Detroit, Michigan).

That a few cases cited by petitioner found Canadian defendants to be subject to jurisdiction in the United States, based on the specific facts present in each of those cases (which did not involve the application of Canadian law), does not reflect a different legal standard. On the contrary, these cases adopt the precise methodology employed by the Tenth Circuit here — a consideration of appropriate factors, previously identified by this Court, without placing primary reliance on any single factor.

Accordingly, petitioner's attempt to fashion a "Federal Circuit test" is contrived. Although the courts of appeals may articulate the governing standards using slightly different linguistic formulations, and although the depth of the jurisdictional discussion might differ from case to case depending on the facts at issue, the methodology applied is the same. In every cited case, the court examined minimum contacts and, finding or assuming that test to be satisfied, turned next to an examination of all of the relevant reasonableness factors as instructed in *World-Wide Volkswagen*, *Burger King*, and *Asahi*. None held that any factor was "paramount." The Tenth Circuit proceeded in exactly that fashion in this case.

## III. THIS CASE DOES NOT PRESENT A SUITABLE VEHICLE FOR ADDRESSING THE QUESTION OF PERSONAL JURISDICTION

Even if this case somehow could be viewed as presenting a colorable circuit conflict, it is a poor vehicle for this Court to opine on the issues presented. In addition to dismissing petitioner's complaint for lack of personal jurisdiction, the district court also found that petitioner's substantive claims were "without merit on their face," in part because the MOU was an unenforceable "agreement to agree." Pet. App. 40-41, 43. The court concluded that there was "no contract to breach" because the undisputed failure of at least one condition precedent listed in the MOU — that of board approval — "clearly precludes the formation of a contract." *Id.* at 42. In light of its affirmance of the district court's dismissal on jurisdictional grounds, the Tenth Circuit did not address petitioner's failure to state a claim upon which relief could be granted.

Any decision rendered by this Court regarding personal jurisdiction would not alter the fact that the merits of petitioner's claims have already been rejected. This Court's scarce judicial resources are better applied to resolving issues that may actually contribute to the ultimate outcome of the litigation. Here, in the unlikely event that petitioner was to prevail on its newfangled bright-line jurisdictional precepts, the ultimate outcome is not in doubt. Petitioner's suit is completely without merit. Accordingly, this case presents a vehicle particularly unsuited for this Court's plenary review.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted.

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